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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 281

MURDO F. MARGESON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Murdo F. Margeson, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 26, 1966.

Opinions Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 1a, is not as yet reported. The opinion of the District Court for the District of Maine, printed in the "Record Appendix To Brief For Appellant," filed herewith, at pp. 82-91, is reported at 246 F. Supp. 219 (1965).

Jurisdiction

The judgment of the court below was entered on May 26, 1966. It is set forth on page 105 of the certified copy of Record Appendix and Proceedings in the court below, filed with this petition, and is also printed in Appendix B hereto, *infra*, p. 5a. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

1. May materials that are merely evidentiary be seized from the person of one being arrested during the course of a search incidental to his arrest?

2. Are ordinary shoes worn by a robber during a robbery, and not used for any unusual purpose, instrumentalities or means by which the robbery was committed?

3. May an arresting officer seize an accused's shoes without having probable cause to believe that they are the particular shoes used in the commission of the offense?

4. Did the arresting officers have probable cause to arrest the petitioner?

Constitutional Provisions Involved

Constitution of the United States

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,

and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . ."

Statutory Provisions Involved

64 Stat. 1239; 18 U.S.C.A. s. 3052, as amended January 10, 1951, c. 1221, s. 1:

> "The . . . agents of the Federal Bureau of Investigation of the Department of Justice may . . . serve warrants . . . issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

Federal Rules of Criminal Procedure

"RULE 41. SEARCH AND SEIZURE

"(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States Commissioner within the district wherein the property sought is located. As amended Apr. 9, 1956, eff. July 8, 1956.

"(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

"(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

"(d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days

after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

"(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where

the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

"(f) *Return of Papers to Clerk.* The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

"(g) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects."

Statement of the Case

On March 19, 1965, a Federal Grand Jury returned an indictment in one count charging,

> "that on or about June 5, 1964, at South Portland, in the Southern Division of the District of Maine, Murdo F. Margeson, by force and violence and by intimidation, knowingly, willfully and feloniously did take from the persons and presence of employees of the Federal Loan and Building Association, Millcreek, South Portland, Maine Branch, Nine Thousand Three Hundred Dollars ($9,300) in money, belonging to and in the care, custody, control, and possession of the said Federal Loan and Building Association. . . ." (R. 2-3.)

On April 16, 1965, Margeson was arraigned and pleaded Not Guilty. (R. 1.)[1]

On April 23, 1965, Margeson filed a Motion For The Return Of Seized Property and The Suppression Of Evidence. Hearings on the Motion were held on May 21, 1965 and May 28, 1965. (R. 1, 3-4.) At the hearing, there was evidence from which the judge found the following (R. 82-87.):

"At approximately 2:00 p.m. on Friday, June 5, 1964, two armed men entered the Mill Creek branch of the Federal Loan and Building Association at South Portland, Maine, took money from the tellers' cages, and fled. (R. 6, 7, 73.) FBI Agent Gibbons arrived at the scene to investigate the robbery shortly thereafter. (R. 6.) During the course of his investigation that afternoon he was informed by Mr. Elmer Inman, a supervisory employee of a nearby supermarket, that at about 11:30 o'clock that morning he had observed a green Chevrolet automobile, with two men in it, parked in the parking lot of the shopping center which serves both the supermarket and the bank; that he had observed one of the men get out of the car and walk completely around the supermarket and along the street in front of the bank before he returned to the car; that he thought this was unusual; and that he had noted the registration number of the car, which was New Hampshire registration "MO 998." (R. 8-9.) Upon receipt of this information Gibbons called FBI Agent Roedell in Concord, New Hampshire, who after inquiry reported to Gibbons that the registered owner of the car involved was the defendant Murdo Margeson, of Warner, New Hampshire. Roedell also reported to Gibbons that Margeson was at the time on bail pending his appeal from a bank robbery conviction in Massachusetts. (R. 9.)

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[1] "R" refers to the certified copy of the "Record Appendix To Brief For Appellant" in the court below, filed herewith.

"During the course of his investigation Gibbons also learned that Mr. Richard Morse, the assistant manager of the bank, was the bank employee who had escorted one of the robbers around the bank. Morse described this robber as a white male about six feet tall, weighing about 160 pounds, slimly built, and agile. He stated that the robber was wearing a handkerchief mask, which obscured the lower part of his face, but that he felt he could identify the man if he saw him again because of the distinctive hair growth on the back of his head at the nape of his neck. Morse also reported that this robber had jumped onto the counter in the bank in order to get to the tellers' cages. Gibbons then examined the bank counter and found two shoe prints, of which the heel impressions were particularly discernible and appeared to him to be of an unusual design. Since it was not possible to photograph the heel prints, Gibbons caused a sketch to be made. The section of the counter involved was also physically removed and preserved. (R. 9-11, 13, 14.)

"On the evening of the robbery Boston FBI agents showed to Morse and the other bank employees a number of photographs, including photographs of Margeson; these photographs of Margeson bore legends showing that they were taken by the Boston Police Department in 1958, and some of them bore his description. The bank employees were unable to identify either of the robbers from these photographs, and Gibbons was so informed. (R. 13, 74-78.) On the same evening Roedell informed Gibbons that Margeson's car with two male occupants, one of whom was Margeson, had been observed by Concord police officers at approximately 5:30 p.m. on that day at the Concord traffic circle, proceeding from the direction of Maine toward Warner. Gibbons knew that the distance from South Portland, Maine to the Concord traffic circle was between

100 and 125 miles and the normal driving time was about 1½ to 2 hours. (R. 12-13.)

"On Saturday morning, June 6, Gibbons and Morse drove to Concord and contacted Roedell for the purpose of permitting Morse to observe Margeson and, if possible, to identify him. Since they were unable to locate Margeson, they returned to Portland that evening. During the course of this trip Morse was again shown photographs of several persons, including Margeson, and was again unable to identify him as one of the robbers. He was also informed at this time that Margeson was the owner of the car which had been seen in the area of the bank on the morning of the robbery. (R. 13-14, 39-41, 77-78.)

"On the following Monday, June 8, Gibbons and Morse again drove to Concord and contacted Roedell. After lunch Roedell received word that Margeson had left his residence in Warner and was driving his car toward Concord. Gibbons and Morse, in Gibbons' car, followed Roedell, in his car, in the direction of Warner. When they were about half way from Concord to Warner, Roedell observed Margeson driving his car in the opposite direction toward Concord. He radioed this information to Gibbons, who after Margeson's car had passed him executed a U-turn, followed and overtook Margeson's car. As Gibbons was overtaking and passing Margeson's car, Morse was able to observe the back of Margeson's neck, his profile and the general shape of his head and shoulders. He stated to Gibbons that Margeson was the robber whom he had escorted around the bank. Gibbons then stopped to telephone the United States Attorney's office in Portland to inform the United States Attorney of Morse's identification and to request authority to file a complaint for an arrest warrant, which was granted. He also telephoned the FBI office in Boston, spoke to the assistant agent-in-charge, informed him that a complaint had been authorized, and requested

additional help for an arrest. At Gibbons' request, FBI Agents Madden and McCarthy were sent from Nashua, New Hampshire to assist in the arrest. (R. 14-16, 44-52, 64, 78-81.)

"While Gibbons was telephoning, Roedell continued the surveillance of Margeson. When Gibbons completed his calls, he reestablished radio contact with Roedell and was informed that Margeson's car was then parked on Main Street in Concord. Gibbons and Morse proceeded to Main Street, where Morse was able to observe Margeson walking on the sidewalk. Once again, he stated to Gibbons that he was convinced Margeson was the robber whom he had escorted around the bank. From Main Street the agents and Morse followed Margeson to the parking area of the Capital Shopping Center in Concord, where Margeson parked his car alongside Britts department store and entered the store. When Margeson did not come out of the store, Gibbons became concerned that Margeson might have observed the surveillance of the agents and might have left by another exit. He thereupon radioed the Boston FBI office, spoke to the assistant agent-in-charge and obtained approval of his decision to make an arrest, before any warrant was issued, as soon as the Nashua agents arrived. He then entered the store to look for Margeson. (R. 15-18.)

"In the meantime, Roedell, together with Agents Madden and McCarthy and Lieutenant Hines and Detective Joslin of the Concord police department, who had arrived to assist in the arrest, placed themselves in positions where they could observe the store entrances. At approximately 3:30 p.m. Roedell observed Margeson leave the store, get into his car and start to drive from the parking area. Roedell moved his car to intercept Margeson's car; got out of his car; approached Margeson's car; identified himself as an FBI agent; and told Margeson that he was under

arrest in connection with the South Portland bank robbery. He instructed Margeson to get out of his car, which Margeson did. Roedell then "frisked" Margeson for weapons and handcuffed him. As Roedell was making the arrest, the other agents and the Concord police officers arrived at the scene; Roedell left to talk with the owner of another car which he had sideswiped in intercepting Margeson; and Gibbons took charge. (R. 18, 26, 34-35, 65-67.) He instructed Margeson to sit in the rear seat of the car with Madden; took Margeson's car keys and opened and searched the trunk; but he found nothing of significance. Gibbons then asked Margeson to remove his shoes, which were loafers. He took the shoes from Margeson and examined the heels, noting that they were of the same pattern as the heel prints which he had observed on the bank counter. He also compared the heels with a rough sketch which he had made of the heel prints, which confirmed his recollection. He then stated in Margeson's presence that the shoes were important evidence and that he was seizing them. Gibbons then returned the shoes to Margeson, saying that the officers would let him wear the shoes until they could get him something else to wear. Margeson was permitted to wear the shoes until they were finally taken from him by Agent McCarthy and Lieutenant Hines approximately one hour after Margeson's arrival at the Concord Police Station. Gibbons' purpose in returning the shoes to Margeson was to spare him from having to travel in his stocking feet. Since a crowd was gathering, the agents drove Margeson's car, with Margeson in it, to a more remote section of the parking lot, approximately 200 to 300 feet away, where Gibbons and McCarthy conducted a search of the interior and trunk of the car, but again found nothing of significance. They then drove Margeson to the Concord Police Station, a distance of five or six blocks, where he was held for approximately an

hour and a half before being driven to Manchester, New Hampshire for his arraignment before the United States Commissioner." (R. 18-20, 27-31, 54-55, 58.)

The Court denied the Motion as to the shoes (R. 91) (the Government voluntarily agreed to the suppression of all of the other items, R. 82 n. 1), and on October 20, 1965, trial commenced before District Judge Gignoux and a jury.

At the trial the Government introduced the shoes into evidence (Ex. 7) over petitioner's objection, along with testimony that petitioner was wearing them when arrested, and that their heels matched heel prints found on the counter of the bank after the robbery. (R. 92-97.)

On October 28, 1965, the jury returned a verdict of Guilty. (R. 2.)

On December 1, 1965, Judge Gignoux sentenced Margeson to imprisonment for a period of twenty (20) years, defendant to become eligible for parole at such time as the Board of Parole may determine. (R. 2, 97-98.)

The sentence was stayed pending appeal and petitioner filed seasonable notice of his appeal to the court below.

The court below affirmed the judgment of the District Court, holding, "that the shoes in question were seized from the *person* of the defendant incidental to his arrest, as relevant evidence of the crime and that under the facts and circumstances here this seizure was lawful." The court below further held that, "In arriving at this conclusion we find it unnecessary to decide the question of whether the shoes were instrumentalities and means by which the crime was committed." (Appendix A hereto, *infra*, pp. 3a-4a n. 8.)

The court below stayed its mandate.

Reasons for Granting the Writ

I. Mere Evidence May Not Be The Subject Of A Lawful Seizure

The court below held that mere evidence [2] may be "seized from the *person* of the defendant incidental to his arrest." This opinion was based on dictum from *Weeks* v. *United States*, 232 U.S. 383, 392, 34 S. Ct. 341, 344, where the Court said that it was *not* dealing with a case involving "the right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime." However, it would seem that this Court has repudiated the *Weeks* dictum.

The general rule was clearly stated by this Court in *Harris* v. *United States*, 331 U.S. 145, 154:

> "This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, *which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest*, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. . . ." (Emphasis added.)

See also, *e.g.*, *United States* v. *Lefkowitz*, 285 U.S. 452, 464-465 (dictum); *Gouled* v. *United States*, 255 U.S. 298,

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[2] "Mere evidence" is used herein to denote material that is relevant to proof of guilt but is not a fruit of the alleged offense, nor an instrumentality by means of which the offense was committed, nor contraband, nor a weapon by means of which an accused could effect an escape.

310-311; *Boyd* v. *United States*, 116 U.S. 616, 622-623 (dictum); *Brock* v. *United States*, 223 F.2d 681 (5th Cir. 1955); *Takahashi* v. *United States*, 143 F.2d 118 (9th Cir. 1944); *United States* v. *Stern*, 225 F. Supp. 187 (S.D.N.Y. 1964); *Entick* v. *Carrington*, 19 Howell's State Trials 1029.

Indicative of this Court's rejection of the *Weeks* dictum is the dictum in *Preston* v. *United States*, 376 U.S. 364, 367, an opinion by Mr. Justice Black joined by a unanimous Court:

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime."

While there has been considerable dictum in support of the position of the court below in following *Weeks*, the only federal cases that can be said to rely substantially on that theory are *Lefkowitz* v. *United States Attorney*, 52 F.2d 52, 54 (2d Cir. 1931), *aff'd*, 285 U.S. 452; and *United States* v. *Pardo-Bolland*, 229 F. Supp. 473, 476-477 (S.D.N.Y. 1964).[3] Directly in conflict with the court below are *Brock* v. *United States*, 223 F.2d 681 (5th Cir. 1955); and *Takahashi* v. *United States*, 143 F.2d 118 (9th Cir. 1944).

The opinions of the state courts and the legislation of many states reflect similar confusion. See Note, *Evidentiary Searches: The Rule And The Reason*, 54 Georgetown Law Journal 593, 594 n. 8, n. 9, 616-621, 628 n. 221 (1966).

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[3] The court below cited *Shettel* v. *United States*, 113 F.2d 34, 35 (D.C. Cir. 1940). However, in that case the seized materials constituted an instrumentality (a notebook in which transactions relating to the crime were recorded, see *Marron* v. *United States*, 275 U.S. 192, 199; *Landau* v. *United States Attorney*, 82 F.2d 285 (2d Cir. 1936), *cert. denied*, 298 U.S. 665), and fruits of the crime (marked coins).

There are basically four positions that may be taken with respect to the seizure of mere evidence:

1. The general application of the rule prohibiting the seizure of mere evidence;
2. The outright rejection of the rule;
3. The acceptance of the rule generally, making an exception for material seized from the person of one who has been lawfully arrested, when the seizure is made in the course of a lawful search incidental to the arrest; and
4. The acceptance of the rule only with respect to private papers.

Those who support the second alternative ask why relevant evidence, seized in the course of a lawful search, should not be admitted in evidence. *E.g.*, 8 Wigmore, *Evidence* s. 2184 a at 45, s. 2264 at 381 n. 4 (McNaughton rev. 1961); *State v. Raymond*, 34 U.S.L.W. 2652 (Iowa, 5/3/66). The answer is that they are asking the wrong question. The proper question is, "What right does the Government have to take the particular property?" This question should not be dismissed as based upon an outmoded concept involving technical rules of title. Rather, it involves, in addition to Fourth Amendment rights, the important right of the citizen guaranteed by the Fifth Amendment to retain his property inviolate unless taken by due process of law.

The Government's power to interfere with the individual is limited to the powers granted by the Constitution. One's property may be taken by taxation, by eminent domain, by fine after criminal conviction. Logically there is no need to justify the taking of the fruits of a crime, for the possessor has no right to protect. Similarly, when the Government outlaws the possession of certain items (contraband),

the possessor has no right to possession to protect. Certain instrumentalities by means of which crimes are committed fall under this category, such as burglar tools. Logically, it is not difficult to place all instrumentalities in this category. *United States* v. *Kirschenblatt,* 16 F.2d 202, 203 (2d Cir. 1926).

Historically, fruits of a crime, contraband, weapons, and instrumentalities could be seized. The power to seize such articles can, therefore, be read into the Constitution. *Ibid.* But the power to seize mere evidence cannot be derived either logically or historically.

Those courts that would accept the third position, taken by the court below, have the logical problem of reconciling the holding of *United States* v. *Lefkowitz,* 285 U.S. 452, 464, that the authority of officers to make a search incidental to an arrest is not greater than that conferred by a search warrant. Even if the mere evidence rule is not required by the Constitution (and, therefore, does not apply to the states, as suggested in *People* v. *Thayer,* 47 Cal. Rept. 780, 408 P.2d 108 (1965) *cert. denied,* 86 S. Ct. 1342; see also *State* v. *Coolidge,* 106 N.H. 186, 208 A.2d 322 (1965)), it is required by a rule made applicable to the Federal Government under Rule 41(b) of the Federal Rules of Criminal Procedure, which limits the kinds of evidence that may be searched for and seized under a warrant. It would be unreasonable to hold that a seizure without a warrant can be of broader scope than one pursuant to a warrant. In addition, the courts taking such a position are faced with an absurd practical result—"mere evidence" in plain sight at the time of an arrest may not be seized, while the same evidence if in the pocket or on the feet of the man arrested, could be seized and admitted into evidence at trial.[4]

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[4] For a good analysis of this position, see Note, 43 Ore. L. Rev. 333, 342-346 (1964), *infra* n. 5.

The fourth position is that recently taken by the New Jersey Supreme Court in *State* v. *Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965) (semble), that the mere evidence rule applies only to private papers. This position is in direct conflict with cases such as *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958), with dicta from Supreme Court cases, *e.g.*, *Gouled* v. *United States*, 255 U.S. 298, 309; and with the Fourth Amendment, which makes no distinction between "papers" and "effects".

The question presented here has caused considerable conflict among, and difficulty to, the federal and state courts. The issues have been well considered by those courts as well as by a number of commentators.[5] The record below is clear and, unless the shoes involved are held to be instrumentalities by means of which the crime was committed, the issue will be squarely presented. The resolution of the issue is necessary for the proper administration of the criminal law, and has been considered for a sufficient time to be ripe for adjudication by this Court.

II. The Shoes In This Case Were Not Instrumentalities By Means Of Which The Offense Was Committed.

The court below did not reach this issue, since it held that the shoes were properly seized even if they were not instrumentalities by means of which the robbery was committed. Appendix A, pp. 3a-4a n. 8, *infra*.

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[5] Note, *Evidentiary Searches: The Rule And The Reason*, 54 Georgetown Law Journal 593 (1966); Shellow, *The Continuing Vitality of the* Gouled *Rule: The Search For And Seizure Of Evidence*, 48 Marquette Law Review 172 (1964); Note, *Search And Seizure Of "Mere Evidence"—Amendment To Or. Rev. Stat. Sec. 141.010—Effect On Prior Law And Constitutionality*, 43 Oregon Law Review 333 (1964); Comment, *Limitations On Seizure Of "Evidentiary" Objects, A Rule In Search Of A Reason*, 20 University of Chicago Law Review 319 (1953).

Considerable conflict appears in the decisions of the federal and state courts.

Directly contrary to Petitioner's position here is *United States* v. *Guido,* 251 F.2d 1 (7th Cir. 1958), *cert. denied,* 356 U.S. 950. Two recent state cases have concurred with the *Guido* case. *State* v. *Bisaccia,* 45 N.J. 504, 517, 213 A.2d 185 (1965) (alternative holding: the mere evidence rule applies only to papers); *State* v. *Raymond,* 34 U.S. L.W. 2652 (Iowa Sup. Ct., 5/3/66) (held: there is no mere evidence rule).

Seemingly contrary to Petitioner's position here is *Morton* v. *United States,* 147 F.2d 28 (D.C. Cir. 1945), *cert. denied,* 324 U.S. 875. However, the same Court said in *Morrison* v. *United States,* 262 F.2d 449, 451 n. 6 (D.C. Cir. 1958), that the *Morton* case "appears to be in conflict with Lefkowitz [*United States* v. *Lefkowitz,* 285 U.S. 452] but is sustainable upon the authorities cited, there having been no timely motion to suppress." Apparently contrary to Petitioner's position here is *Robinson* v. *United States,* 283 F.2d 508 (D.C. Cir. 1960). But it is impossible to determine from that opinion whether this point was raised and whether the court was ruling on it.

The courts in the *Guido, Bisaccia,* and *Raymond* cases felt that there was no significant distinction between clothing used actively in the commission of an offense, such as a mask or gloves to prevent identification, and clothing used merely as clothing. The Court in the *Guido* case pointed out that shoes "would facilitate a robber's getaway and would not attract as much attention as a robber fleeing bare-footed from the scene of a holdup." 251 F.2d at 3. In the *Raymond* case, the Court took the position that "the more ordinary the garb the more it supports a criminal venture." 34 U.S.L.W. 2652.

This seems to be stretching the meaning of "instrumentality" beyond reason. In *Preston* v. *United States,*

376 U.S. 364, 367, the Court used instead the words "implements used to commit the crime." Unless the shoes are in some way unusual, designed or used as an active part in the commission of the offense,[6] they should not be considered instrumentalities. *United States* v. *Stern,* 225 F. Supp. 187 (S.D.N.Y. 1964). This seems to be the holding in *Morrison* v. *United States,* 262 F.2d 449 (D.C. Cir. 1960). In that case, the Court held that "a handkerchief which . . . had been used by Morrison and which allegedly bore some tangible evidence of the offense" (262 F.2d at 450) was mere evidence, and, therefore, not subject to seizure. In *LaRue* v. *State,* 149 Tex. Cr. App. 598, 197 S.W. 2d 570, bloodied clothing was excluded as mere evidence. These cases would seem more in accord with common sense than the *Guido, Bisaccia,* and *Raymond* cases.

The conflict among the federal and state courts on this question can only be settled by this Court. If the prohibition against the seizure of material which is merely evidentiary is to have any meaning, the distinction between such material and material that is classed as "instrumentalities by means of which an offense was committed" must be further clarified.

III. There Was No Probable Cause To Believe That the Shoes Were Instrumentalities or Other Evidence of the Crime.

The right to seize incide[redacted]n arrest can be no broader than the right [redacted] a warrant. See, *e.g., United States* v. *Lefko[redacted]*52, 464; *Morrisson* v. *United States,* 262 F.2d 449, 451 (D.C. Cir. 1958).

[6] *E.g., State* v. *Mark,* 46 N.J. 262, 216 A. 2d 377 (1966), in which shoes that were seized had been used to kick down a door in committing the offense.

In order to get a warrant to search defendant's home for these shoes, the applicant would have had to convince a magistrate that he had probable cause to believe that these shoes were instrumentalities or other evidence of the crime.[7] Therefore, in order to seize them incidentally to a lawful arrest, the seizing officer must have had probable cause to believe that these shoes were the same shoes worn by one of the robbers. *Henry* v. *United States,* 361 U.S. 100, 104.

If the shoes were taken from Margeson, as Agent Gibbons testified (R. 18), before they were examined and identified as having similar heelmarks to those used in the robbery, then they were taken from Margeson without probable cause to believe that they were the shoes used in the robbery. Even the comparison made by Gibbons at the scene between the shoes and the sketch he had made of the impression on the counter at the bank (R. 19-20; Government's Exhibit No. 1) did not give Gibbons probable cause, for the sketch merely showed that the impression was made by an O'Sullivan heel. It showed no characteristics by which a particular shoe could be identified. And no one had described the kind of shoes worn by either of the robbers. (R. 14, 73-74.)

The Government argued in the court below that if probable cause were required before seizure, "Laboratory analysis, which often plays an important part in connecting seized evidence to a crime, could be used only in those cases where evidence was obtained without a seizure." *Brief For Appellee,* at p. 9. The implication of that argument is that "fishing expeditions" ought to be allowed. However, the posesssions of a man who is suspected or accused of a crime are not all available for shipment to the F.B.I. laboratory for analysis. The standards of prob-

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[7] "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the . . . things to be seized."

able cause required for the seizure of a person ought also to be required for the seizure of his papers and effects. This rule should be applied whether the seizure is to be under color of a warrant or incidental to an arrest.[8]

While this proposition seems obvious to Petitioner, it was described by the District Court as "novel" and "dubious" (R. 90 n. 5). It's a point that has not been settled by this Court, but one that certainly should be if the Court should find merit to Petitioner's position.

IV. The Arrest Was Unlawful.

Under 18 U.S.C.A. sec. 3052, Agents of the Federal Bureau of Investigation are authorized to "make arrests without warrant . . . for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

The issue of probable cause, or "reasonable grounds", hinges entirely on Morse's identification of Margeson as the robber whom he had escorted around the bank. Without that identification, the three other pieces of information—that Margeson's car had been seen near the bank on the morning of the robbery; that the car, with Margeson in it, had been seen in the evening after the robbery at the Concord, New Hampshire, traffic circle coming from the direction of Maine, and that Margeson had been convicted of bank robbery in Massachusetts—would not have been sufficient to establish probable cause.

Shortly after the robbery, Morse described one robber as a "man wearing green chinos with a green jacket with a green cap, and who had a handkerchief tied around his

[8] This is not a case in which the arresting officers saw the accused deliberately try to hide or destroy the seized articles, as in *Abel* v. *United States*, 362 U.S. 217, 238.

nose." (R. 73.) He also said that the robber was about "six feet, 160 pounds, slim of build, agile type of man, that the hair growth on the back of the head which he was able to observe was the chief point through which he could identify this individual." (R. 14.) On the night of the robbery, Morse and the other bank employees were shown pictures of Margeson and others. None could identify any of those in the pictures as the robbers. (R. 13.) The next day, Morse was taken to New Hampshire to view Margeson. Although the trip was abortive, Morse was again shown Margeson's pictures. He was made aware that Margeson had a police record, what Margeson's description was, that Margeson was the owner of the car seen near the bank on the day of the robbery, and that Margeson was the chief suspect. He still could not identify Margeson from the pictures. (R. 38-41, 74-78.)

On Monday, Morse was again taken to New Hampshire to view Margeson. After Margeson's car was spotted, Morse, who was sitting in the passenger's seat of a car driven by Gibbons, was told to observe Margeson while Gibbons drove past his car. He observed Margeson for a few seconds. He "noticed that his hair was the same as I remembered the person who was in the bank." He "told Mr. Gibbons that that was one of the men who were in the bank as far as the back of the neck was concerned." (R. 15, 78-80.) Gibbons testified that Morse also identified Margeson by "the general profile of the head . . . the general area around his shoulders and the head." (R. 15.) Later, after seeing Margeson walking, Morse "said that after seeing the man walk and his general build and appearance that he was more than convinced that he was right and that Margeson was the man that entered the bank." (R. 18.) (R. 42-51.)

Based upon Morse's testimony of his identification, the

United States Commissioner in Manchester, New Hampshire, found no probable cause to hold Margeson. (R. 72.)

Having in mind that eye-witness identification is notoriously unreliable, it is petitioner's contention that this identification was too weak to provide probable cause for an arrest. Having observed Margeson's pictures on more than one occasion, having read his description, having been informed of his record, knowing that the car owned by him was seen near the bank before the robbery, knowing that he was the prime suspect—with all this, it would have been a miracle if Morse had not identified Margeson.

Three recent cases in the appellate courts deal extensively with the issue of eye-witness identification. *Stovall* v. *Denno,* 355 F.2d 731 (2d Cir. 1966); *Wade* v. *United States,* 358 F.2d 557 (5th Cir. 1966); *Palmer* v. *Peyton,* 34 U.S.L.W. 2570 (4th Cir. 4/6/66). What was said by Judge Sobeloff in *Palmer* v. *Peyton* is equally applicable here:

> "The opportunity for suggestion inherent in the procedure used to secure this identification is manifest....
>
> "Any identification process ... involves danger that the percipient may be influenced by prior formed attitudes. ... Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.
>
> "To alleviate the effect of such influences upon a complaining witness, a lineup is generally regarded by police authorities as essential....

"In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment . . . . Such a procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land. . . ."

Regulation of identification procedures is of obvious importance in the further development of pre-arraignment protection of criminal suspects. The need for regulation has been demonstrated. The course which it will take should be determined by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6671.

MURDO F. MARGESON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Daniel Klubock, with whom *Paul T. Smith* and *Manuel Katz* were on brief, for appellant.
William E. McKinley, United States Attorney, with whom *David G. Roberts*, Assistant U. S. Attorney, was on brief, for appellee.

OPINION OF THE COURT.
May 26, 1966.

McENTEE, *Circuit Judge*. Defendant was convicted of bank robbery in violation of 18 U.S.C. § 2113(a). The robbery occurred on June 5, 1964, at the Mill Creek Branch of the Federal Loan and Building Association in South Portland, Maine. The facts and circumstances of the case are set forth adequately in the district court's opinion [1] and for that reason we shall refer to them only briefly here.

The basis of this appeal is that the trial court erred

[1] 246 F.Supp. 219 (1965).

in allowing the government to introduce in evidence a pair of black shoes which the defendant was wearing on June 8, 1964, when arrested in connection with this robbery, along with testimony that their heels matched the heel prints found on the counter of the bank shortly after the robbery.[2] Defendant contends that this evidence was inadmissible against him because the shoes were unlawfully seized from his person on the day of his arrest.[3]

He challenges the seizure on the grounds (1) that his arrest was unlawful in that it was made without a warrant and without probable cause, and (2) that even if the arrest were lawful, the search and seizure were not, because (a) the search was not made incidental to the arrest, and (b) the shoes were mere evidentiary material and as such were not subject to seizure.

The government admits that the shoes were seized from the person of the defendant on the day of his arrest; that the arrest was not made pursuant to a warrant and that at no time did the arresting officers have a search warrant. However, it justifies the seizure as being reasonably incident to a lawful arrest.

The principal issue raised with reference to the legality

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[2] There was testimony that one of the robbers had jumped onto the counter in the bank in order to get to the tellers' cages; that two shoe prints of which the heel prints were particularly discernible, were found on the counter, and that the FBI agent in charge of the investigation caused a sketch to be made of these heel prints which he compared with the heel prints on the defendant's shoes at the time of the arrest.

[3] Defendant also raised this question by a pretrial motion for the return of seized property and the suppression of evidence which was denied by the district court. Subsequently, the government voluntarily returned other property seized. The only property involved in this case is the shoes. The trial court overruled defendant's objection to the admission of the shoes in evidence and to the admission of the testimony linking them to the heel prints on the counter of the bank for the reasons stated in its opinion denying defendant's pretrial motion. See fn. 1.

of the arrest was the matter of probable cause. From a review of the evidence and for the reasons stated in its opinion,[4] we agree with the finding of the district court that the arresting officers had probable cause to believe that this defendant had committed the crime with which he was charged[5] and that the arrest without a warrant[6] was lawful. Also, from our examination of the record we are satisfied that the shoes in question were seized from the *person* of the defendant incidental to his arrest,[7] as rele-

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[4] See fn. 1.

[5] At the time of the arrest, the arresting officers knew that (a) an automobile registered to the defendant with two men in it was seen parked near the bank about three hours before the robbery; (b) about 5:30 on the afternoon of the robbery defendant's car, in which he and a passenger were riding, was seen entering the traffic circle at Concord, New Hampshire, coming from the direction of Maine. The normal driving time from the bank to the traffic circle was about two hours; (c) the defendant had been convicted of bank robbery in Massachusetts and was on bail pending appeal, and (d) just before the arrest, the defendant was positively identified as one of the robbers by the assistant manager of the bank. The trial court found that this knowledge was more than sufficient to show probable cause.

[6] The arrest was made by an FBI agent. See 18 U.S.C. § 3052 for authority of FBI agents to make arrests without a warrant. Defendant's claim that the arrest could not be validated by showing probable cause because in fact the officers were proceeding under a warrant which proved to be defective is at variance with our decision in *Lawton* v. *Dacey*, 352 F.2d 61 (1st Cir. 1965), *United States* v. *Hall*, 348 F.2d 837 (2nd Cir. 1965), *cert. denied* 382 U.S. 947.

[7] At the time of the arrest, which occurred outside a department store in Concord, New Hampshire, an FBI agent took off defendant's shoes and compared them with the sketch of the heel prints found on the counter of the bank shortly after the robbery. He noticed a similarity and stated he was seizing the shoes as important evidence and thereupon returned them to the defendant so that he would have something on his feet. Defendant wore the shoes to the Concord police station. About an hour later while at the police station the shoes were again taken from him. Defendant contends that the shoes were not seized until he was at the police station, an hour after the arrest, and this is the basis for his contention that the search was not incidental to the arrest. The district court found that the seizure of the shoes occurred at the time and place of the arrest and was, therefore, incidental to the arrest and lawful.

vant evidence of the crime and that under the facts and circumstances here this seizure was lawful. *Weeks* v. *United States*, 232 U.S. 383, 392 (1914) (*dictum*); *Shettel* v. *United States*, 113 F.2d 34, 35 (D.C.Cir. 1940); *Lefkowitz* v. *United States Attorney*, 52 F.2d 52, 54 (2d Cir. 1931), *aff'd*, 285 U.S. 452 (1932); *United States* v. *Pardo-Bolland*, 229 F.Supp. 473, 476-77 (S.D.N.Y. 1964).

We, therefore, conclude that the district court did not err in denying defendant's pretrial motion for the return of seized property and suppression of evidence, nor did it err in admitting the shoes in evidence, along with the testimony linking them to the heel prints found on the counter of the bank.[8]

No other questions raised need be considered.

Affirmed.

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[8] In arriving at this conclusion we find it unnecessary to decide the question of whether the shoes were instrumentalities and means by which the crime was committed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6671.

MURDO F. MARGESON,
Defendant, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

JUDGMENT
May 26, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Klubock and McKinley.]